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IN THE

Supreme Court of the United States

October Term, 1957

A. MASCHMEIJER JR., INC.,

Petitioner,

—against—

EASTERN MOTOR EXPRESS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPORTING BRIEF OF THE NATIONAL BARREL & DRUM ASSOCIATION, INC., *Amicus Curiae*

NATIONAL BARREL & DRUM ASSOCIATION, INC.

MORRIS HERSHSON,
Attorney,
200 West 57th Street,
New York, N. Y.

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Preliminary Statement

Consent for the filing of this brief *Amicus Curiae* was granted by respondent and petitioner; stipulation of consent is being submitted simultaneously herewith.

In respectfully submitting this brief, the National Barrel & Drum Association, Inc., hereinafter called the "Association", is interested exclusively in obtaining a correct determination of the question whether, under the common law, shippers are charged with an implied, absolute warranty concerning the fitness of the containers transported by common carrier; and a proper interpretation of a common carrier's obligation as an insurer.

I

The "Association" is a non-stock, non-profit corporation, organized and existing under the laws of the State of New York, with offices located at 1145—19th Street, N. W., Washington, D. C., and is the national trade association of the reconditioned wooden barrel and steel drum industry, representing reconditioners of and dealers in wooden barrels and steel drums. Reconditioning plants of the members are located throughout the United States.

II

The sole interest of the "Association" in this proceeding is the effect of the decision below, insofar as it is *stare decisis*, upon the steel drum industry, as well as upon the customers of the steel drum industry, who are the shippers of material packaged in drums. Steel drums are used in interstate commerce for the transportation of a large percentage of the liquid and semi-liquid products of the industrial economy of the United States. Among the industries using steel drums are the petroleum industry, the chemicals industry, the paint, varnish and lacquer industry, the lard and shortening industry, the glue and adhesives industry, etc. According to figures compiled by the Bureau of the Census of the United States Department of Commerce, in 1956 there were 18,326,000 55-gallon drums manufactured, and, on a sampling survey, at least 22,353,000 55-gallon drums reconditioned. The industry estimates that probably 60,000,000 steel drums of that size alone are used annually in interstate commerce.

It is obvious, therefore, that any decision which drastically changes the liabilities and responsibilities of ship-

pers and carriers of material packaged in steel drums is of grave consequence to the entire economy—not only to the shipper-companies directly involved, which number tens of thousands throughout the country, but also, indirectly, to their customers and to the ultimate consumer. The business of each shipper of petroleum, chemicals, paints, lards, adhesives, etc., which in the aggregate represents billions of dollars, is seriously affected. This decision is, consequently, of the deepest concern to the business of each of the "Association's" members, amounting, in the aggregate, to tens of millions of dollars.

III

The question sought to be determined is the legal liability of a shipper to a motor carrier for damages resulting from the leakage of liquid freight contained within steel drums. The issues include:

(a) The question whether, under the common law, the shipper is charged with an implied *absolute* warranty concerning the quality of the container which the shipper offers for transportation to a common carrier.

(b) The obligations of a common carrier as an insurer.

IV

The facts, briefly, are as follows:

The respondent, a common carrier by motor vehicle in interstate commerce, was offered for transportation by the petitioner, a manufacturer of various chemical products, thirty (30) drums of a chemical known as methyl phenyl acetate. The respondent inspected the drums, found them

in good condition, accepted the shipment, and issued a "clean bill of lading" to the petitioner therefor.

In the course of the transportation of this shipment, respondent claims that two of the drums leaked, and caused damage to other material in respondent's truck, as well as to the truck itself. Respondent sued on several theories—1–negligence, 2–breach of express warranty, and 3–breach of implied warranty.

The express warranty is contained in the certificate attached to the bill of lading, which certificate in effect warrants that the drum is in compliance with I C C regulations for the shipment of the particular product. This warranty was held inapplicable by the Trial Court which held that it only applies to the shipment of "dangerous" products, and the material in this case was not in that category. The shipment was actually governed by Rule 5, subsection 8(a) of Tariff MF-ICC No. 17, National Motor Freight Classification No. 9 which provides as follows:

> "Barrels • • • drums • • • must be made of wood • • • metal or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

The petitioner submitted evidence that it had used due care in the packaging, that it had selected good drums, and that it had complied with the above stated Packing Rule by supplying drums which afforded "reasonable and proper protection of contents • • • ". After a trial without a jury, the District Court granted motions to dismiss the complaint, based upon a finding of fact that the petitioner had submitted drums to the respondent which, in all respects,

complied with the governing rules adopted in the National Motor Freight Classification. On appeal to the United States Court of Appeals, the Court reversed the decision, basing its reversal solely on a ruling that because the drums had leaked, the petitioner

> "had breached an implied warranty existing under the common law, as recognized by the Packing Rule",

and that this implied warranty is *absolute*. From this decision the petitioner is petitioning for writ of certiorari to this Court.

V

The decision of the Court of Appeals that a shipper of steel drums is liable *absolutely* for damages to other freight resulting from leakage because of an implied warranty will, if upheld, adversely affect all manufacturers of new drums, all reconditioners of used drums, and all shippers of material packaged in steel drums, whether such drums are new, reconditioned or un-reconditioned. Shippers of containers of all other kinds, steel pails, wooden barrels, fibre drums, etc., totaling hundreds of millions, will be equally affected.

Prior to this decision by the Court of Appeals, there was ample precedent that a common carrier was the insurer of merchandise received by it, the only exceptions to such liability being Acts of God, force majeure, loss due to inherent nature of goods, *or the fault of the shipper*. The decision of the Court of Appeals in the instant case completely reverses this long-standing rule, because under the decision, the shipper is liable *whether or not he is at fault*. The decision states:

> "As a defense to the plaintiff's claim of breached warranty, the degree of care exercised by the defendant is irrelevant, for—with exceptions not pertinent here—the duty of the defendant as bailor-warrantor is absolute".

Therefore, the Court of Appeals in effect held that whether a shipper uses a new drum, or a reconditioned drum, or a used drum which has not been reconditioned, or whether the shipper is at "fault", is "irrelevant". Such a ruling relieves the carrier of his responsibility as an insurer, and shifts the responsibility, *absolutely*, to the shipper.

ARGUMENT

I.

A ruling that a shipper of goods impliedly, absolutely warrants that a container is fit for transport, is necessarily inconsistent with, and a reversal of the longstanding common law rule dictating the obligations of the common carrier.

A. At common law the common carrier has the duties of an insurer.

Several theories have been advanced concerning the origin of the doctrine that common carriers are insurers of goods. That it arose from the special duty of one engaged in a public occupation to warrant the fitness of his performance is perhaps the most correct historically.

In *Coggs* v. *Bernard*, 2 Ld Raym 909 (1703), a case involving the liability of a gratuitous carrier Lord Holt, by dictum, announced the principle that common carriers are bound "to carry goods against all events but acts of God

and enemies of the King". Although Lord Holt meant to include a larger variety of occasions within the exemption, acts of God, the later cases recognized only the acts of God as are known today. Eighty-two years later, Lord Mansfield, in *Foward* v. *Pittard*, 1 T. R. 27 (1785), held a faultless common carrier liable for loss of goods, giving birth to the universally accepted concept that "a carrier is in the nature of an insurer". This statement, as adopted by all the English and American courts, placed upon the common carrier all the duties of an insurer but not all its rights.

What Lord Mansfield meant by the statement, "a carrier is in the nature of an insurer", is made manifest by the United States Supreme Court in *Hall and Long* v. *The Railroad Cos.*, 60 U. S. 367, 13 Wall (1871). The court granted to an insurance company recovery from a common carrier for the loss paid by the insurance company to the insured shipper whose goods had been destroyed while being transported by the common carrier. The court said:

> "A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, *and even greater*, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to cession on the principles peculiar to the contract of insurance; and when loss occurs, unless caused by an Act of God, or of a public enemy, *he is always in fault. The law raises a conclusive presumption of his misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent in fact he has consented by his contract to be dealt with as if he were not so.*" (Emphasis supplied)

It is firmly established that the common carrier's obligations are at least as great as those of an insurer.

B. The common carrier in this case is liable for the loss of goods, which loss does not fall within any of the exceptions.

In order for a common carrier to escape from the liability created by this rule of law, it must prove that the loss or damage was caused by an event falling within the exceptions to the rule.

An act of God, or the act of a public enemy were the two exceptions enumerated by *Coggs* v. *Bernard*, *supra*.

Two additional exceptions have evolved from the decisions of the courts over the years. The common carrier is not responsible where either the inherent nature or vice of the goods themselves, or the faulty acts of the shipper, give rise to the loss.

The *Coggs* v. *Bernard*, *supra*, exceptions are clearly inapplicable in this case.

The third exception concerns itself primarily with perishable goods. Our litigation does not deal with perishable goods, and the District Court found no inherent vice in the nature of methyl phenyl acetate. It found, further, that the drums used were the best available type. The carrier, therefore, has the burden of proving that the loss was caused by the fault of the shipper, the final exception provided by the common law.

The carrier proceeded to trial on three theories.

First it claimed that the shipper was guilty of a tortious fault, that it was negligent. But the District Court found

that the shipper employed the reasonable care required by using the strongest type of containers after having adequately tested them for fitness.

Secondly, the carrier contended that the shipper was guilty of a breach of an express warranty, i.e. a contractual fault whereby the carrier was injured by reliance upon a certification that the goods being shipped were "Harmless Chemicals". The District Court found that there was no reliance on the description in the carrier's determination to carry the load, because the carrier knew that the certificate was unnecessary; and in fact methyl phenyl acetate was accurately described by that phrase. The second express warranty upon which the carrier claims to have relied was that said certificate contained in the bill of lading stated that the shipment met with the rules and regulations of the Interstate Commerce Commission. The District Court found no breach of this express warranty, and found further that the certificate was inapplicable, because the product was not dangerous or harmful. The Court of Appeals found no breach of any express warranty.

The third theory contended was that the shipper breached an implied warranty contained in the express provisions of the bill of lading that the goods were fit for transportation. The District Court properly found no implied warranty on the part of the shipper, reasoning that the bill of lading is a restatement of the common law which never included implied warranties, but the Court of Appeals reversed, holding that at common law a shipper impliedly, absolutely warrants the fitness of the containers. *Any support of the Court of Appeals' theory is inconsistent with the fourth exception to the general rule.* Liability for breach of an implied, absolute warranty does not mean

that the shipper was at fault. The implied warranty is a legal fiction utilized to place the loss on one party where neither was tortiously or contractually at fault, but where fortuitous circumstances caused the loss or damage. To be harmonious with the common law doctrine of the common carrier's liability as extending at least as far as that of an insurer, the loss, not having been caused by any of the four exceptions, must be placed on the common carrier regardless of the fact that it was faultless. *Hall and Long v. The Railroad Cos., supra.*

II.

There is no source of authority for holding the shipper of goods via common carriers to absolutely warrant impliedly that a container is fit for transport.

The Interstate Commerce Act, Part I, 49 U. S. C. Section 20 (11) provides for the liability of interstate common carriers for loss, damage, or injury to shippers' goods. Part II of this Act, 49 U. S. C. Section 319 makes this section applicable to motor carriers. This statute imposes upon the carrier the same duties as those which are imposed by the common law. *Missouri R. Co. v. Harriman*, 227 U. S. 657, 33 S. Ct. 397, 57 L. Ed. 690 (1913).

The relationship between the shipper and carrier and the responsibilities of each are fixed in the agreement made and contained in the bill of lading in accordance with the tariffs and regulations published by the Interstate Commerce Commission. *American Ry. Express Co. v. Amer. Trust Co.*, 47 F. 2nd 16 (C. C. A. 7) (1931); *L. & N. Ry. Co. v. Chatters*, 279 U. S. 329, 49 S. Ct. 329 (1928). As the District Court said, the bill of lading is a restatement of

the common law; and held that there was no implied warranty in this case at common law. The Court of Appeals, reversing, held "that the defendant (shipper) had breached an implied warranty (of fitness) existing under the common law as recognized by the Packing Rule". It further stated that "the duty of the defendant, as bailor-warrantor is absolute".

This cannot have been the common law recognized by the Packing Rule, for there has never been such a doctrine set forth at common law applying to common carriers.

The rule of implied warranty was developed to relocate the loss in sales cases where the doctrine of *caveat emptor* prevailed. Previously the courts held that the loss due to a defect in the purchased chattel would fall on the buyer where the seller did not expressly warrant the article's fitness. Even where the seller innocently misrepresented the article to be something of much greater value in his advertisement, invoice, and bill of sale, the court would not place the liability on the seller. *Seixas* v. *Wood*, 2 Caines 48, 2 Am. Dec. 215 (1804). Eighty years later in *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108, 3 S. Ct. 537 (1884) the court adopted the legal fiction of implied warranty in order to retain the long established principle of *caveat emptor*, but to alleviate the hardship on the buyer where the seller, a builder in that case, was in a better position to know of the product's defects. Most courts were reluctant to apply this legal fiction establishing absolute liability. When it was applied it was usually limited to sales cases.

The Uniform Sales Act Section 15 contains a provision for the implied warranty of fitness for a particular pur-

pose. New Jersey, the state in which the present transaction took place, has adopted the Uniform Sales Act, and in Section 46:30-21 New Jersey Statutes provide:

> "Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> (1) Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods be reasonably fit for such purpose."

The act in restating the law as it developed in many jurisdictions does so negatively. It manifests the courts' policy in limiting absolute liability, stating that there is *no* implied warranty *except* in certain situations.

The basis for such a warranty is the buyer's reliance on the seller's skill and judgment. It is presumed that the buyer is a novice and is not capable of determining the fitness of the goods. In this case the common carrier handles drums of this type regularly, and is in a position to ascertain the fitness of the drum as well as the shipper. In *Dunbar Bros.* v. *Consolidated Iron & Steel Mfg. Co.*, 23 F. 2nd 416 (C. C. A. 2 1928), the court held that the buyer of iron springs from the manufacturer had the opportunity for reasonable examination of the samples, and should have discovered defects, latent or otherwise and, therefore, could not rely on an implied warranty of fitness theory. The court reasoned that the buyer, being a manufacturer

of locks, and concerned with the problem of obtaining proper springs, could not assert that it relied on the skill and judgment of the seller, even though the seller was the manufacturer of the springs.

Today in many jurisdictions the restaurateur is held to absolutely warrant that his food is fit for human consumption. *Friend* v. *Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100 (1918); *Temple* v. *Keeler*, 238 N. Y. 344, 144 N. E. 635, 35 A. L. R. 928 (1924). But many jurisdictions hold that there is no warranty implied, and require that the negligence of the restaurateur be proved. They hold this on the theory that no sale takes place, but only a service is supplied. In *F. W. Woolworth Co.* v. *Wilson*, 74 F. 2nd 439 (C. C. A. 5 1939) the court said "* * * and that by long settled law there is a duty on the furnisher to use skill and care in procuring the materials, in preparing and serving them, for failure of which damages may be recovered; but no warranty is to be implied imposing liability irrespective of negligence."

Recently the Court of Appeals of New York, in *Perlmutter* v. *Beth David Hospital*, 308 N. Y. 100, 123 N. E. 2nd 792 (1954) denied recovery to a patient where the hospital furnished her with impure blood during a transfusion, distinguishing this from a sale of food situation by holding that this was a contract for services, and not a sale as contemplated by the Uniform Sales Act. The court refused to draw an analogy from the sales cases, and would not recognize any implied warranty.

Decisions such as these make manifest the policy that the courts use restraint in applying the doctrine of absolute liability, and are reluctant to extend the implied warranty fiction beyond sales cases.

In the area of bailments for hire, liability is sometimes based upon implied warranty of fitness. The Court of Appeals in the instant case, drew an analogy from the bailment for hire situation, and applied it to the shipper-common carrier relationship. The bailment for hire is a transfer of possession of a chattel in exchange for rental and contemplated return of chattel to the owner. The courts reason that because the bailee relies on the supplier-bailor, that the chattel is fit for the purpose bailed, the bailor impliedly warrants its fitness.

According to Williston, there was considerable support for the view that the seller did not warrant against latent defects. *I. Williston, Sales* Sections 233, 237 (rev. ed. 1948). The Uniform Sales Act changed that view as to sales, "*but it persists in bailment cases.*" *Implied Warranties of Quality in Non-Sales Cases, E. Allan Farnsworth*, 57 Col. L. Rev. 653, 657.

The leading bailment case, cited by the Court of Appeals as holding the bailor to an implied warranty of fitness, where the chattel apparently had a latent defect, is *Hoisting Engine Sales Co.* v. *Hart*, 237 N. Y. 30, 142 N. E. 343 (1923). In this instance the bailor's derrick fractured and caused property damage while the bailee was using it for the purpose set forth in the contract of bailment. The cases which the court cites as authority are all sales cases; in addition to which it quotes from Halisbury's Laws of England, Vol. 1 Section 1117:

> "• • • his (the bailor's) delivery of it to the hirer amounts to an implied warranty that the chattel is in fact fit and suitable for that purpose *as reasonable skill and care can make it.*" (Emphasis supplied)

The court continues, "This is the rule to be applied to the facts of this case."

If this were the rule which should have been applied as stating the common law, then there is no absolute warranty of fitness even in bailment cases. The warranty under this rule is for fitness "*as reasonable skill and care can make it.*" This is a test used in determining whether a defendant is liable under the theory of negligence.

California has quoted the rule of common law applicable in bailment-for-hire circumstances in two recent cases.

> "A bailor's implied warranty of fitness does not make him an insurer against all personal injuries suffered from the defective operation of the bailed chattel. *He impliedly warrants only that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it was hired.*" (Emphasis supplied)

McNeal v. Greenberg, 40 Cal. 2nd 740, 255 P 2nd 810 (1953); *Sproul v. Cuddy*, 131 Cal. Ap. 2nd 85, 280 P 2nd 158 (1955).

The pivotal question which the California court asks is, did the bailor discharge his duty of exercising reasonable care? If the answer is yes, he is not negligent and, therefore, not liable for any damage caused by the defect, be it property or personal injury.

New Jersey is the locus of the transaction in the instant case. In *Brandt v. Asarnow*, 7 N. J. Misc. 803, 147 A 233, affd. 106 N. J. L. 559, 150 A. 917 (1929) the court said:

> "• • • the established rule in such cases (bailments for hire) is that *the bailor is required to use due care* to have the article *reasonably* fit for the purpose for which it was bailed." (Emphasis supplied)

Since the bill of lading is a restatement of the common law of carrier liability, and the issue of whether it has been complied with is a federal question to be determined by federal law, *Chesapeake & O. Ry.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453 (1931), and since there is no federal common law, *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938), the federal courts must decide whether an analogy to bailments for hire is applicable to shipper-carrier relationships.

Wherein lies the resemblance of a common carrier to a bailee for hire?

The common carrier is an insurer of goods, and no negligence need be proven for it to be liable. The bailee is not an insurer. He is liable only if his negligence causes the loss or damage. *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, 62 S. Ct. 156 (1941); *Schiavone-Bonomo Corp.* v. *Buffalo Barge Towing Corp.*, 132 F. 2nd 766 (C. C. A. 2 1942); *Franklin* v. *Airport Grills, Inc.*, 21 N. J. Sup. 409, 91 A 2nd 348 (1952).

In common carrier litigation, the rule is that the burden of proof lies on the common carrier to exonerate itself once the shipper shows that his goods were damaged or lost. *Clark* v. *Barnwell*, 53 U. S. 272, 13 L. Ed. 985 (1851). The bailee, on the other hand, does not have the burden of proof, and it is incumbent upon the bailor to show that the bailee was negligent. *Commercial Molasses Corp.* v. *Tank Barge Corp., supra; The Ponce*, 67 F. Supp. 725 (1946), aff'd. 160 F. 2nd 107.

The bailee, in hiring the chattel, pays the bailor for its use. The common carrier does not pay the shipper for use of the goods shipped, but rather receives a fee for the services which it provides.

In fact the sole similarity is that the common carrier takes possession of the shipper's goods and contemplates transporting them to another party. This is not a sufficient criterion for drawing an analogy in lieu of the many legal differences and consequences.

Assuming that analytically an analogy can be drawn, are the reasons for adopting absolute liability valid in our case? The task of proving negligence on the part of the shipper would not be an impossible one. The carrier, for example, would only have to show that the shipper's inspection tests are inadequate to meet the due care standard of a reasonable man. Evidence to this effect was introduced by the carrier, but it failed to meet its burden, the District Court ruling that the standard was reasonable.

Justice in no way can require that an insurer of goods be compensated merely because damage has been done by the shipper's goods. The theory of implied warranty is to relocate the loss where neither party is at fault. But the law has presumptively distributed the loss beforehand by charging the common carrier with the obligations of an insurer.

The Court of Appeals, in holding that "* * * the duty of the defendant, as bailor-warrantor is absolute", cited two cases as authority for this proposition, completely new to shipper-carrier relationships. The first, *Overbury* v. *Platten*, 108 F. 2nd 155, (C. C. A. 2 1939), is not in point. This case holds that pledgees of stock can attach it for another debt owed to them by the pledgor, and have a valid lien on the stock.

The second case cited, *Mulvaney* v. *King Paint Mfg. Co.*, 256 F. 612 (C. C. A. 2 1919) involved a libel for a breach

of charter. The plaintiff chartered a barge to the defendant who subchartered it to a third person. A disaster damaged the barge and the court found that the defendant was not at fault. Plaintiff proceeded under the theory of breach of an express covenant to return the barge in the same condition as received. The court said that an express covenant to keep safely requires the bailee to keep the barge as a reasonable man would, and as in the common law the bailee is not an insurer for the thing bailed, therefore, should it be destroyed without his fault, he is not liable.

The court added that the parties may covenant that the bailee be an insurer. This implies that if the bailee were an insurer, then he would be liable irrespective of fault. This proposition would support the shipper in our case, for the common carrier is an insurer at common law.

There are no common carrier cases supporting the theory proposed by the Court of Appeals.

In *W. A. Hover & Co.* v. *Denver R. G. W. R. Co.*, 17 F. 2nd 881 (C. C. A. 8 1927), the common carrier sued the shipper for damage caused by a fire resulting from the leakage of carbon bisulphide from its containers. The carrier complained that the shipper had failed to comply with the Interstate Commerce Commission's regulations requiring that the liquid be stored in heavier gauged containers. The court, in holding that the regulation was unauthorized, and that, therefore, there was no negligence *per se*, said by way of dictum, that had the shipper complied with the regulation, still the railroad could not recover, for it was the carrier's burden to prove that it was the shipper's failure to fulfill his obligations which caused

the cans to leak. The court nowhere mentions an implied warranty on the part of the shipper.

The case of *National Distillers Products Corp.* v. *Companhia Nacional de Navegaco,* 167 F. Supp. 65 (1952) is in point. Here a consignee sued a ship owner and a railroad for loss of wine due to leakage from the pipes in which the wine was shipped. The ship owner conceded liability for the loss from Portugal to Pennsylvania, Pa. The pipes which had leaked were coopered or reconditioned by the consignee, so that the leakage stopped before the railroad loaded the pipes into freight cars bound for New York. The railroad issued a clean bill of lading. The court held that the common carrier which had accepted wine for shipment could not escape liability on the ground that the containers were inadequate to withstand normal rail carriage without loss.

Commodity Credit Corp. v. *Norton,* 167 F. 2nd 161 (C. C. A. 3 1948) speaks only of negligence when discussing the carrier's defense, where a shipper sued a common carrier for loss occasioned by leakage of castor oil from its containers. Here again there is no mention of implied warranty on the part of the shipper.

Where then lies the source of the implied warranty fiction as applied to common carriers? The only authority applying this theory to cases involving common carriers is the English doctrine involving the shipment of dangerous goods, where the carrier is not notified that the goods are dangerous.

The proposition originates in *Brass* v. *Maitland,* 119 Eng. L. R. 940 (1856) holding the shipper to an implied

warranty of fitness. This was not a common carrier case, but later common carrier cases followed its reasoning. Here the shipper failed to give a private carrier notice of the dangerous article, chloride of lime. He had told them it was bleaching powder. *Bamfield* v. *Goole*, 2 K. B. 94 (1910) held that a shipper who delivers goods in fact dangerous to a common carrier, without notice of the danger, impliedly warrants that the goods are fit for transportation. In that case the shipper did not notify the carrier of the fact that it was shipping ferro-silicon, a dangerous chemical, but instead called it "general cargo".

Grt. No. Rwy. v. *L. E. P. Trans. & Depos. Ltd.*, 2 K. B. 742 (1922) held that forwarding agents who deliver goods in fact dangerous (perhydrol) to a common carrier without notice of the danger (the goods were described as oxygen water, a harmless chemical) are liable on the theory of implied warranty.

These cases as synthesized, state the law of England to be that the shipper of goods which are not known by the carrier to be dangerous, impliedly warrants that the goods are such as may be safely carried, and are not dangerous. If in fact they are dangerous, and damage results, the shipper is absolutely liable. This applies to a common carrier under a duty to carry, whether the duty is determined by statute or common law.

There is no reference to non-dangerous goods in the English rule. Further, even with reference to dangerous goods, there is no implied warranty if the carrier is aware that the goods are dangerous, and has been so notified by the shipper.

In our case the District Court found as a fact that the goods were accurately described as methyl phenyl acetate, that m.p.a. is not listed in the Motor Carrier Explosives & Dangerous Articles Tariff of the Interstate Commerce Commission, and that they were not dangerous.

The District Judge recognized the English rule by footnoting his statement that he failed to find "any basis for the implication that the containers shall never leak in carriage", by adding that he excepts dangerous articles from this rule.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Court of Appeals erred in finding that at common law a shipper impliedly, absolutely warrants to the common carrier that a container is fit for transportation.

It is the contention of the National Barrel & Drum Association, Inc. that the common carrier is liable as an insurer, unless one of the four exceptions is applicable, and that the shipper is liable only when he is at fault.

It is urged that a review of this decision is vital on a national scale, to all common carriers, all shippers of products in any type of container, and, indirectly, to all industrial and ultimate consumers of such products.

It is further urged that the failure to reverse the decision of the Court of Appeals will result in substantial harm to container manufacturers, container reconditioners, shippers of all products packaged in containers, as well as the general public. We therefore pray that this Honorable

Court grant the petition for writ of certiorari to review the decision of the Court below.

Respectfully submitted,

NATIONAL BARREL & DRUM ASSOCIATION, INC.

By MORRIS HERSHSON, *President*
An Attorney at Law of the State of New York, and the District Court of the United States for the Southern District of New York

200 West 57th Street
New York, N. Y.